STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AMEREN ILLINOIS COMPANY d/b/a Ameren Illinois, Petitioner Rate MAP-P Modernization Action Plan - Pricing Filing	))))))	Docket No. 12-0001

AMEREN ILLINOIS COMPANY'S RESPONSE TO ILLINOIS INDUSTRIAL ENERGY GROUP'S AND COMMERCIAL GROUP'S MOTION TO STRIKE PORTIONS OF AMEREN'S BRIEF ON EXCEPTIONS

Ameren Illinois Company d/b/a Ameren Illinois ("AIC") hereby responds to the Motion to Strike and Memorandum of Law in Support (together "Motion") of IIEC and Commercial Group (together "IIEC"). IIEC seeks to strike AIC's reference in its Brief on Exceptions to Illinois House of Representatives Resolution 1157 ("HR 1157"), passed on August 17, 2012, (i) because HR 1157 is not part of the evidentiary record, and (ii) the Commission cannot take administrative notice of a resolution. (IIEC Mem. 1.) IIEC's Motion should be denied for the simple reason that AIC may properly cite HR 1157 (an official act of the Illinois House) in briefing as legal authority in support of its arguments—much as AIC could cite a law journal article, an accounting treatise, or Black's Law Dictionary.

AIC cites the Resolution in support of its interpretation of Section 16-108.5 of the Public Utilities Act ("Act")—a question of *law*, not of fact. Thus, IIEC's arguments that HR 1157 is not in the evidentiary record, that it is not "admissible" as "evidence" of legislative intent (IIEC Mem. 7) or that the Commission cannot take administrative notice of HR 1157 are simply irrelevant.[1]

[1] As IIEC notes, a ruling of the ALJs on August 22, 2012 struck portions of AIC's Reply Brief that referenced HR 1157 prior to its passage by the House. But, as IIEC also acknowledges, a significant change in circumstances

I. ARGUMENT

A. The Resolution Is Legal Authority, Not Evidence.

IIEC's Motion fails to recognize the difference between evidence and legal argument. IIEC claims, incorrectly, that AIC cites the Resolution as "evidence." (IIEC Mem. 1.) AIC does not. IIEC also claims the Resolution "is not admissible as proof of legislative intent." (IIEC Mem. 3.) However, the Resolution's "admissibility" is not the question. AIC agrees that HR 1157 is not in the evidentiary record. But whether it is in or it is out is irrelevant: HR 1157 can be cited as persuasive legal authority (and IIEC does not argue that it cannot). The same response applies to IIEC's argument that the Commission cannot take administrative notice of HR 1157. That question is irrelevant as well, as administrative notice is not required in order to make citations to legal authority in briefing. How persuasive a formal statement from the Illinois House of its intent in passing the EIMA as legal authority is for the Commission to judge. But IIEC's concerns about the evidentiary weight of authority are not a basis to strike it—just as a concern that a case might deserve little weight is not a basis to strike a citation to that case.

The House of Representatives adopted HR 1157 on August 17, 2012, with a resounding majority of support (86 to 23 in favor). As IIEC acknowledges (IIEC Mem. 5), the General Assembly defines a resolution as an official "action, in the form of a formal legislative document, **taken by the Senate alone, the House of Representatives alone**, or both the Senate and House acting jointly . . . to express the opinion of **one or both houses** or to take some action short of enacting a law that is within the province of **one or both houses**." Illinois General Assembly, Ill. Legislative Glossary, available at http://www.ilga.gov/legislation/glossary.asp#R

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occurred when the House passed HR 1157 on August 17, 2012. HR 1157 is now an official act of the Illinois House.

(emphasis added). Contrary to IIEC's suggestion, both chambers do not need to act on a resolution. Thus, on August 17, 2012, HR 1157 became an official act, and a secondary source of legal authority, much as legislative history, a law journal or an academic treatise might be. This is particularly true as the Commission derives its power solely from the legislature. Citation to the Resolution and discussion thereof informs the Commission of new legislative developments meant to help guide the Commission in its interpretation of the EIMA.

IIEC argues the Commission cannot consider the resolution as proof of how the General Assembly intended the Commission to interpret and apply Section 16-108.5. In particular, IIEC argues that HR 1157 is not part of the legislative history leading up to the enactment of Section 16-108.5, and represents the view of only one chamber of the General Assembly. But that is a question of weight—which is for the Commission to decide, not IIEC. That IIEC believes HR 1157 should be given little weight as legal authority is not a basis to strike citations to it. Whether HR 1157 constitutes "legislative history" in a strict sense is also irrelevant—as an official act of the Illinois House, it can be cited in briefing. The Commission itself has considered "resolutions, debates and other sources of legislative intent" cited by a party when evaluating the party's arguments on the correct interpretation of Section 8-402 of the Act. ComEd Petition for Approval of Initial Clean Air Act Compliance Plan, Order, Docket 93-0027, 1993 Ill. PUC LEXIS 233, *15 (July 8, 1993).

Moreover, IIEC's position is legally incorrect. The Supreme Court has expressly held that "while arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent." Andrus v. Shell Oil Co., 446 U.S. 657, 666 (1980). Further, the courts should use **everything** available to determine legislative intent: "[where] the mind labours

to discover the design of the legislature, it seizes everything [sic] from which aid can be derived." Id. at 666, n.8 (quotations omitted). Even **pending** legislation should be considered. See United States v. De Bonchamps, 278 F.2d 127, 134 (9th Cir. 1960) (Jertberg, J., dissenting); J.D. Robinson v. United States, 192 F. Supp. 253, 254 (N.D. Ga. 1961). It is illogical that pending legislation can be considered, but that a formally adopted resolution cannot.

In fact, post-enactment legislative developments are routinely considered (and accorded varying degrees of weight) in efforts to discern legislative intent. "Although post-enactment developments cannot be accorded 'the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of [the statute at issue] . . . .'" Bell, 456 U.S. 512 at 530-35 (citations omitted) (considered and discussed at length post-enactment history, including a published summary of the final version of a bill, proposed agency regulations and responsive resolutions of disapproval, and individual resolutions introduced but not acted upon); see Andrus, 446 U.S. at 657 (considered post-enactment Interior Department decisions and amendments passed by Congress); Cannon v. U. of Chicago, 441 U.S. 677, 688 n.6-7 (1979) (considered statements by members of Congress four years after enactment of and about the purpose and scope of the statute at issue made in connection with another statute); Sioux Tribe of Indians v. United States, 316 U.S. 317, 329-30 (1942) (considered a statement made almost five years after enactment by the same committee who reported the statute). Thus, AIC's citation to HR 1157 in briefing is appropriate.

Recent legal precedent also shows IIEC's argument is incorrect. Just this March, the Illinois Supreme Court found the statements from just two Illinois Representatives in a House debate indicative of legislative intent. See Wisnasky-Bettorf v. Pierce, 965 N.E.2d 1103, 1109 (Ill. 2012). The Court has also considered the statement of a single Senator. See Central Ill.

Pub. Serv. Co. v. Pollution Control Bd., 116 Ill. 2d 397, 406 (1987). If the Court can consider statements from just one or two individual legislators, it is not logical to argue the Commission is prohibited from considering the resolution adopted by the House with an overwhelming majority of legislators in support. The Supreme Court has also specifically looked to resolutions, even those not passed by Congress, as evidence of legislative intent. See Eldred v. Ashcroft, 537 U.S. 186, 227-230 (2003) (Stevens, J., dissenting). Thus, it cannot be said that courts, or the Commission, are precluded from considering resolutions.

B. The Authority Cited by IIEC Is Distinguishable.

The case law cited by IIEC is distinguishable. Moreover, three of the cases relied on by IIEC have been superseded by current practice because, to the extent they stand for the proposition that either statements of legislators specifically or legislative history generally cannot be relied on, the current practice does allow the courts to consider those very things.

First, People v. Moran, 378 Ill. 461, 464 (1941), has no bearing on this case whatsoever. Nor does the case support the argument that evidence of legislative intent that is outside the record in this case cannot be considered. In Moran, while appealing a conviction of conspiracy (including conspiracy to commit forgery), plaintiffs stated they had been acquitted by another jury of forgery and insinuated that charge of forgery was included in the indictment in the case on appeal. Id. The Court could not consider the statement because the indictment (the record) contained four counts of conspiracy, each of which plaintiffs were found guilty, not forgery. Id. IIEC makes no attempt to explain how a decision in a criminal case that excluded statements about the outcome of another criminal case, with a different jury and different charges than the conviction on appeal, has any bearing upon this case. Further, criminal cases are governed by

specific evidentiary rules concerning the admissibility of statements about a defendant's prior criminal history that are not applicable to this case.

Second, People v. Chicago Railways Co., 270 Ill. 87 (1915), does not stand for the proposition for which IIEC cites it—that the law prohibits consideration of "post facto" statements of intent, because it dealt with statements made prior to enactment of the ordinance at issue. That case and Belleville and Illinoistown Railroad Co. are further distinguishable because they both concerned legislation acting essentially as a contract between a railroad company and a municipality to build and maintain railways. The Court's decision in both cases was narrowly tailored to this specific type of legislation. Belleville and Illinoistown Railroad Co., 15 Ill. 20, 27 (1853) ("this class of legislation should be construed by its own terms, and without reference to extraneous circumstances, and should be so framed as not to mislead or deceive those to whom it is addressed."); Chicago Railways Co., 270 Ill. 87, 106-07 (1915) (consideration of legislative intent is not appropriate when the enactment "is a proposition for a contract.").

Moreover, to the extent IIEC reads Chicago Railways Co. as suggesting that individual legislator statements cannot be considered, this has been superseded as shown in Wisnasky-Bettorf, above. In the same vein, to the extent IIEC reads Belleville and Illinoistown Railroad Co. or Chicago Railways Co. as suggesting courts are prohibited from considering legislative history, this has been superseded by current practice in which legislative history is commonly considered in considering a statute's construction. See Wisnasky-Bettorf v. Pierce, 965 N.E.2d at 1109; Central Ill. Pub. Serv. Co., 116 Ill. 2d at 406 (1987). In addition, a careful read of U.S. v. Trans-Missouri Freight Assoc., 166 U.S. 290, 320 (1896), also cited by IIEC, shows the Court did not limit its analysis to legislative history. Rather, the Court considered the totality of the circumstances surrounding the enactment of the statute, including the contemporaneous history

of the legal situation at the time of the passage of the statute, and the evil the statute was intended to remedy. Id. This practice continues in Illinois today as courts look beyond the statutory language and consider the purpose of the law, the evils it was intended to remedy, as well as the legislative history of the statute. See Johnston v. Weil, 241 Ill. 2d 169, 175-76 (2011). AIC's reference to the Resolution is in the same vein: it is intended to demonstrate the totality of the circumstances in support of AIC's arguments regarding the interpretation of the EIMA. Thus, the references are appropriate to include in briefs, and the case law cited by IIEC does not require otherwise.

II. CONCLUSION

In interpreting a statute, the "cardinal rule of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intent of the legislature." See Collinsville Comm. Unit Sch. Dist. No. 10 v. Regional Bd. of Sch. Trustees of St. Clair Cty., 218 Ill. 2d 175, 186 (2006). If the main tenet of statutory construction, above all else, is to give effect to the legislature's intent, it is unquestionably appropriate to look to very specific statements of the same. It was important for the General Assembly to enact the EIMA, and it is important that it to be applied in the manner it was intended. HR 1157 is an official act that formally "expresses the opinion" of the Illinois House on the interpretation of the EIMA. It can be cited as legal authority. For this and the foregoing reasons, IIEC's Motion to Strike should be denied in its entirety.

Dated: September 10, 2012

Respectfully submitted,

Ameren Illinois Company
d/b/a Ameren Illinois

/s/ Rebecca L. Segal

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CERTIFICATE OF SERVICE

I, Rebecca L. Segal, an attorney, certify that on September 10, 2012, I caused a copy of the foregoing *Ameren Illinois Company's Response to Illinois and Industrial Energy Consumers' and Commercial Group's Motion to Strike Portions of Ameren's Brief on Exceptions* to be served by electronic mail to the individuals on the Commission's Service List for Docket 12-0001.

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